Supreme Court of the United States.

ALBERT K. HISCOCK, as Trustee in bankruptcy of Jacob M. Mertens, *et al.*,
Appellant,

against

THE VARICK BANK OF NEW YORK,
Appellee.

This is an appeal under Section 25 B, Subdivision I of the Act of Congress relating to bankruptcy from an order of the United States Circuit Court of Appeals for the Second Circuit, reversing the decree of the United States District Court of the United States for the Northern District of New York, which in turn affirmed an order of a Referee in bankruptcy in that District, disallowing two claims of the Varick Bank of New York, one filed against the copartnership estate of J. M. Mertens & Company, and the other against the individual estate of a partner, Jacob M. Mertens.

Statement.

The facts as found by the court below and as established by the Record, and which under Gen-

eral Orders in Bankruptcy XXXVI are conclusive on this appeal are substantially as follows:—

On and prior to August 18th, 1903, Jacob M. Mertens, Charles M. Mertens, Ernest T. Mertens and Edmund A. Mertens were copartners engaged in manufacturing clothing under the firm name of J. M. Mertens & Co. Jacob M. Mertens was the father of the other copartners. On that day, an involuntary petition in bankruptcy was filed against the copartnership and the individual members composing it. On September 15th following, they were adjudicated bankrupts as individuals and copartners, and thereafter and on October 14th following, the appellant was elected the trustee of both the copartnership and individual estates (fol. 89, p. 48).

On the day that the petition in bankruptcy was filed, the copartnership was indebted to the Appellee, the Varick Bank of New York, in the sum of $27,893.85. This was predicated upon promissory notes and bills receivable made by the copartnership and Jacob M. Mertens, discounted by the Bank, and notes of third persons endorsed by the firm or by Jacob M. Mertens individually, or both, and discounted by the bank for the firm.

Among the obligations upon which the copartnership was liable, were five collateral notes, four for the sum of Five thousand dollars each, and one for Twenty-five hundred dollars, a total of Twenty-two thousand five hundred dollars. All were made and endorsed by the copartnership. The twenty-five hundred dollar note was signed by Jacob M. Mertens, individually, as a joint maker, and he likewise endorsed and guaranteed the payment of all the collateral notes. Jennie Mertens, his wife, also guaranteed the payment of the note of Twenty-five hundred Dollars. These five collateral notes were all of the same form as the one set out in the record (fol. 90, p. 48).

On the day the petition was filed Mertens individually was indebted to the bank in the sum of Twenty-five thousand four hundred and eighty-nine and 62/100 Dollars ($25,489.62). This indebtedness was predicated upon his endorsement and guaranty of the five collateral notes before mentioned, on one of which he was also a maker, the balance of the indebtedness being based upon his endorsement of sundry notes of third parties discounted by the bank for the copartnership.

Mertens individually, to secure the payment of his debt, and that due by the copartnership, pledged to the bank two policies of insurance upon his life, one for Fifty thousand Dollars ($50,000), No. 417,171 (Ex. G, pp. 51-52-53); the other for Ten thousand Dollars ($10,000) No. 252,314 (Ex. H, pp. 53-54-55).

The Fifty thousand dollar policy is known as a free Tontine policy, was issued on February 15th, 1889, payable to Mertens or his estate, the yearly premium $1,735, and the Tontine dividend period expires on the 15th day of February, 1909 (Ex. G, pp. 50-53).

The ten thousand dollar policy was issued on December 21st, 1882, payable to Jennie Mertens, wife of the insured, but in the event of her prior death to the children of the insured, the annual premium is $272.50. It was known as a Tontine Savings Bank policy. The Tontine dividend period expired on the 21st day of December, 1902, at which time under the terms of the policy, Mertens, as the insured, withdrew in cash the share of the accumulated surplus apportioned by the Society to the policy, and continued it in force on the ordinary plan (Ex. H, pp. 53-55).

On the 16th of March, 1901, Jennie Mertens, and the children of Jacob and Jennie, executed

an assignment of the $10,000 policy to the bank (Ex. I, p. 64). On March 25th, 1901, Jacob M. Mertens joined with his wife in executing a further assignment of the same policy to the bank (Ex. F, p. 64). On March 21st, 1901, Mertens, individually executed an assignment of the $50,000 policy to the bank (Ex. E, p. 64).

These assignments transferred all of the interest of the insured and the beneficiaries in the policies for the payment of the debts due or to be created by the partnership with the bank, giving it the right to surrender them on default in the payment of the debts.

In addition, the policies were pledged to the bank under the terms of the collateral notes and agreements of pledge. They provided substantially, that for value received, and stated, *the makers and endorsers* jointly and severally promised to pay to the bank or order, the sum stated as well as the payment of any liability or liabilities due from the *makers and endorsers* to the bank, then due or thereafter to become due, whether then existing, or thereafter arising.

The notes also contained the provision that the bank shall have a lien, for the amount of all the liabilities of the *makers and endorsers* to it, upon the property or securities given or left in its possession by them, and that upon the non-performance of the contract, or default in the payment of any of the liabilities due,

> "then, and in either such case, this note shall forthwith become due and payable, without demand or notice, and full power and authority are hereby given to said holder to sell, assign and deliver the whole of the said securities, or any part thereof, or any substitutes therefor, or any additions thereto, or any other securities or property given unto or left in the possession of the holder by the under-

signed, for safe keeping or otherwise, at any broker's board or at public or private sale, at the option of the said holder, without either demand, advertisement or notice of any kind, which are hereby expressly waived. At any such sale the said holder may purchase the whole or any part of the property sold, free from any right of redemption on the part of the undersigned, which is hereby waived and released, etc." (fols. 90-91, p. 49).

Endorsed upon the back of each of the collateral notes, and signed by Jacob M. Mertens, appears the following:

"In consideration of one dollar paid to the undersigned, and of the making, at the request of the undersigned, of the loan evidenced by the within note, the undersigned hereby jointly and severally guarantee to the Varick Bank of New York, N. Y., its successors, endorsers or assigns, the punctual payment, at maturity of the said loan, and hereby assent to all the terms and conditions of the said note, and consent that the securities for said loan may be exchanged or surrendered from time to time, or the time of payment of the said loan extended without notice to or further assent from the undersigned, who will remain bound upon this guaranty, notwithstanding such changes, surrender or extension" (fol. 91, p. 49).

On the day that the petition was filed, the bank held obligations which had matured and remained unpaid, aggregating $1,691.93.

On the day that the order of adjudication was entered, the bank held obligations matured and unpaid, aggregating $13,530.47. In this amount was included two of the collateral notes of $5000 each, and about $2000 of the notes of third persons likewise endorsed.

On September 10th, 1904, the bank filed against

the copartnership estate, an unsecured claim for the sum of $27,893.85, and on the same day filed against the individual estate of Jacob M. Mertens, a secured claim for the sum of $25,489.62 (p. 55).

At the time these claims were filed, the referee caused their allowance to be deferred until a meeting of the creditors should be held. In the interim and on November 14th, 1904, the Appellant filed objections to their allowance (p. 63), alleging in substance and effect that the sale of said policies was illegal; that the value of the securities held by the Bank had not been ascertained as required by the bankruptcy act, and that the policies were still held by it as collateral to said indebtedness, the Appellant still owning the equity (p. 63).

On December 1st, 1904, amended proofs of claim were filed, and the objections filed to the original proofs of claim were allowed to stand as objections to the amended proofs.

The amended claim against the copartnership, after reciting in detail each individual obligation upon which it was founded, crediting an off-set of $173.21 held by the bank on general deposit to the credit of the copartnership, and rebating the interest subsequent to the date of the filing of the petition, alleged: that at the time of the filing of the petition, the Bank held as security "WHICH WAS DEPOSITED BY JACOB M. MERTENS INDIVIDUALLY," property particularly described (p. 59).

The claim against Mertens individually, also sets out in detail each obligation held by the Bank at the time of the filing of the petition, that it was secured by the individual deposit of Mertens for the sum of $6,000, and the two policies of insurance mentioned, and then alleges:

> "That under and by virtue of the terms of the agreement under which the said policies

were deposited as collateral with the said bank, the said bank was authorized and empowered by the said bankrupt upon default in the payment of the said debt or any part thereof to sell, assign or otherwise dispose of the said collateral security at public or private sale with or without notice to the said bankrupt, as is more particularly specified in the said agreement. That in accordance with the said agreement as aforesaid, the said Varick Bank of New York did, prior to the date of the adjudication herein and subsequent to the date of the filing of the petition, convert the said policies into money in accordance with the terms of the agreement under which the same were deposited, realizing therefor the sum of $10,221, leaving due and owing to said Varick Bank of New York, the sum of $9,118.37, etc." (p. 62).

The hearing on the claims and objections having come on before the referee, the following facts were *mutually conceded*:

1. That prior to or on the 14th day of September, 1903, the Bank gave to its attorneys, the two policies in question.

2. That prior to or on the said date, the policies were handed by the Bank's attorneys to a duly licensed auctioneer, with instructions to sell the same at public auction at *the New York Sales Rooms in the City of New York, Borough of Manhattan.*

3. That no notice of said sale was given to any one except the Bank.

4. *That on said 14th day of September, 1903, at 2 p. m. thereof, the said policies were offered for sale at said New York Real Estate Sales Rooms to*

the highest bidder by said auctioneer. That only one bid was made by one of the attorneys for the Bank in the name of Herbert M. Delanoie, who was not present, for the sum of $10,250. *That said policies were sold separately, the $5,000 policy for $7,000, the $10,000 policy for $3,250.*

5. That the Bank prior to said sale, had instructed its attorneys that *should* they purchase the policies, to do so in the name of Delanoie.

6. That prior to the sale, the bank drew its check on the Western National Bank to its own order for the sum of $10,279, which the cashier of the Bank cashed in bills, and handed to its attorneys.

7. That after the sale, its attorneys gave said money to the auctioneer, and that the auctioneer's fees were $29.

8. That after the sale, the auctioneer gave the bank's attorneys his certified check for $10,250, to the order of the Bank, which check was delivered to the Bank by its attorneys.

9. That after the sale, the bank and the auctioneer severally executed bills of sale for each of the policies in question, transferring to Delanoie, all the right, title, and interest of Jacob M. Mertens, and the bank in the policies.

10. That the policies were purchased by the Bank at said sale, and that whatever title was acquired by Delanoie, was taken for the bank, and he, said Delanoie, still holds the policies for the bank, subject only to the rights of the Knickerbocker Trust Co., to the extent of a loan of $10,250, which the Knickerbocker Trust Co. made on these poli-

cies to Delanoie, and which amount Delanoie delivered to the Bank, and subject to a further loan of $2,622.75, since loaned thereon with interest.

11. That on August 19th, 1903, the day after the filing of the involuntary petition in bankruptcy, the bank had actual notice that a Receiver had been appointed of both the firm and the individual estates (pp. 63, 64).

Thereupon the following colloquy occurred:

> "*Mr. Czaki.*—I ask the Court to allow the claims of the Varick Bank of New York as filed upon the records and documents in evidence.
>
> *Mr. Crowly.*—I move for the disallowance of both of the claims on the ground that the claims have not been properly proved, or the value of the securities set forth in the claims has not been proved, and no evidence from which that value can be ascertained and found by the Court has been given so as to establish the balance.
>
> *Mr. Czaki.*—The attorney for the creditors requests to know of the attorney for the trustee whether he rests his case under the objections as filed.
>
> *Mr. Czaki.*—I move that the referee decide that the burden of proof in the proceeding is upon the trustee, not having received any response to my question as to whether he had rested" (p. 65).

Thereupon the Referee in an oral decision, disallowed both claims as filed, stating, however, that the bank might, if it so wished, *offer further evidence, with a view of establishing the value of the policies* (p. 65).

The Appellant then made a motion that the Court direct a method by which the security be liquidated and that in so doing the bank *resell the policies upon notice to the trustee.* Objection being made to this motion, the Referee reserved decision (p. 66).

The Bank then filed its petition in the District Court to review the Referee's action.

Thereupon the Referee granted the appellant's motion and directed that the bank make public sale of the policies upon notice to the trustee, and all the parties interested, including the insurance Company (p. 66).

The review of the Referee's decision resulted in an affirmance of his orders disallowing the claims and directing a resale of the policies (p. 66).

134 Fed. Rep., 101.

An order of affirmance was subsequently entered. From that order, the Bank appealed to the Circuit Court of Appeals for the Second Circuit and a decision was rendered in all respects reversing the order of the District Court and directing the allowance of the claims as filed.

144 Fed. Rep., 818.

The Circuit Court of Appeals thereupon made findings of fact as above detailed, and found as conclusions:

1. That the order of the Referee and the District Court was a rejection of the claims.

2. That the policies did not belong to the partnership estate, and that the claim against the partnership should have been allowed in full.

3. That the sale of the policies under the facts as stipulated, was good and valid and passed a good and valid title to the bank.

4. That the value of the policies was properly liquidated by said sale under the terms of Section 57 H of the Bankruptcy Act, and that under said section the Referee had no power to make the order directing a resale thereof.

5. That the Bankruptcy Act did not suspend or enjoin the exercise of the power of sale during the time between the filing of the petition and the adjudication.

6. That the said claim against the individual estate of Mertens should have been allowed in full.

7. That the burden of proving that said sale was unfair was upon the trustee (p. 66).

Thereupon an order of reversal was entered, and a mandate issued from which an appeal was taken to this court by the appellant.

Subsequently the bank made a motion under Rule 6 that the appeal be dismissed, or, in the alternative, that the decree appealed from be affirmed, upon the ground that the appeal was taken for delay only. Decision upon this motion was reserved until a hearing upon the merits.

POINTS.

I.

The order of the District Court affirming the decision of the Referee was a final disallowance and rejection of the claims of the bank.

The Referee in his opinion disallowing the claims said:

> "As the proof now stands, I shall, therefore, *decline to allow* either claim as established against the estate or estates" (p. 65).

The recital in the opinion of the District Judge states:

> "Objections having been filed by the trustee to the allowance of each claim, mainly on the ground that the value of such collateral had not been properly ascertained or credited; that the value of the policies has not been ascertained as provided by Subdivision H. Section 57 of the Bankrupt Act, *the Referee disallowed both claims as matters stand, and made an order prescribing the method for ascertaining the value of such policies.*" (Italics ours.)
>
> 134 Fed. Rep., 102.

The conclusion of the learned District Judge is thus stated in his opinion:

> "The orders of the Referee *disallowing* the claims are approved and affirmed."
>
> 134 Fed. Rep., 105.

The order entered upon the opinion of the District Judge provides:

> "Ordered, that the ruling of the said Referee rendered herein on the 2nd day of December, 1904, be and the same hereby is, in all respects and things, approved and affirmed." (Fol. 51, p. 27.)

The decision of the Referee that the sale of the policies was not a valid exercise of the power conferred, that the Bank still held them as security, as though no sale had been had, and directing that they be resold, was in fact a total disallowance and rejection of the claims as filed.

In disposing of this point, the Circuit Court of Appeals said:

> "We entertain no doubt that the order appealed from was in substance and effect a rejectment of the claims such as to authorize an appeal pursuant to Section 25 of the Bankrupt Act, as well as a review pursuant to Section 24. The bank insisted that its claims were for a definite amount, the amount stated in its proofs of debt less the sum which it had already derived from the sale of the securities. *The decision not only disallowed these claims, but left the bank remediless, unless it should consent to allow a different reduction.*" (Italics ours.)
>
> 144 Fed Rep., 819.

II.

The decree of the Circuit Court of Appeals directing the District Court to allow the Bank's claim against the partnership in full is not erroneous.

A.

The Bank was not a secured creditor within the meaning of the term "secured creditor" as defined by the Bankrupt Act.

Judge Ray, referring to the Bank's contention, that the policies were the property of Mertens, and not the copartnership, and hence that its claim was not "secured," said:

> "The trouble with this contention is, the amended claim does not so show or state, and in one of the notes at least, the policies are pledged in writing by the firm as well as by J. M. Mertens as owner. As such policies were assignable, this Court will not assume they were owned solely by J. M. Mertens individually.
>
> 134 Fed. Rep., 102.

The learned District Judge obviously erred. He overlooked the fact that the amended proof of debt against the partnership distinctly states:

> "That at the time of the filing of said petition, the Varick Bank of New York held as collateral security for the payment on said debt, *which said collateral was deposited by J. M. Mertens individually, the following described property, to wit*: * * * a certain policy of insurance upon the life of J. M. Mertens in the Equitable Life Assurance Society of the United States, No. 417171, for

> the sum of $50,000, and a certain other insurance policy upon the life of J. M. Mertens in the said Equitable Life Assurance Society of the United States, No. 252314, for the sum of $10,000" (p. 59).

The appellant, in his objections to this claim, admitted that the collateral held by the Bank was pledged to it by Mertens individually:

> "Said claim (partnership debt) is further objected to on the ground that certain payments have been credited thereon by J. M. Mertens, individually, *and certain credits should have been made thereon on account of collaterals furnished to said bank by J. M. Mertens for the payment thereof, etc.*" (fol. 29, p. 16).

Furthermore, it was conceded by the Appellant, that these policies were assigned and pledged to the Bank by Mertens individually, and the members of his family, *and not by the copartnership* (Exhibits E, F, I, 12th and 16th Concession, fols. 113, 114, p. 64).

The original proof against the individual estate also alleged:

> "That at the time of the filing of the petition in bankruptcy, said Varick Bank of New York held as collateral security *property of said bankrupt* (*J. M. Mertens*), which property according to the terms of the agreement, etc." (fol. 5, p. 3).

Judge Ray in his opinion states, that it does not appear, and the Court would not assume that the firm did not own at least an interest in the policies, when, upon the face of one of the notes, it appeared that the Company pledged them as security for one of the notes in question.

That the policies were pledged to secure the copartnership debt, is no evidence of the fact, assumed by the District Judge, that the copartnership had any interest in, or title to the policies.

The fact that Mertens individually was the owner of these policies, and that he, and not the copartnership, pledged them with the bank for the payment of its debt, *was never disputed, in fact conceded, and cannot now be questioned.* The objection to the claims presented no such issue. The appellant's position was that the bank was obliged to apply the avails of the policies in payment and reduction of its claim against the copartnership.

Sub-Division 23, of Section 1 of the Act defining the term "secured creditors," provides:

> " 'Secured creditor' shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some endorser, surety, or other person secondarily liable for the bankrupt, has such security upon the bankrupt's assets."

That "secured creditor" has a limited meaning in bankruptcy must always be remembered. In effect, no creditor is secured in bankruptcy unless there is a lien held by him, or accruing to his benefit, *upon the property of the bankrupt.*

The copartnership estate is entirely distinct from that of the individual. The assets must be separately administered, and can in no way be so commingled as to deprive a creditor holding security upon the individual estate of a partner from proving the full amount of his debt against the copartnership estate, irrespective as to whether he has or not filed a claim against the individual estate.

In re Noyes Bros., 127 Fed. Rep., 286;
Gorman *vs.* Wright, 136 Fed. Rep., 164;
Swarts *vs.* Fourth Natl. Bank of St. Louis, 117 Fed. Rep., p. 1;
In re Swift, 106 Fed. Rep., 65;
In re Heyman, 95 Fed. Rep., 800;
In re Bingham, 94 Fed. Rep., 796;
In re Headley, 97 Fed. Rep., 765-771;
In re Coe, Powers Co., 1 Am. Br. Rep., 275;
Collier on Bankruptcy, 3rd Ed., p. 321;
Madison Sp. Bank *vs.* Pierce, 137 N. Y., 444.

Section 20 of the Act of 1867, in this respect, is identical with Sub-Div. H of Section 57. It provides in part,

> "When a creditor has a mortgage or pledge of real or personal property *of the bankrupt, or a lien thereon,* for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the Court shall direct." (Italics ours.)

Under that act, it was uniformly held that a creditor was not secured unless he held, as collateral, property of the bankrupt, or the endorsement of an accommodation maker or endorser who held security upon the property of the bankrupt.

In re Anderson, 7 Biss., 233;
In re Cram, 1 Hask., 89;
In re Howard Cole & Co., 4 Natl. Bank Register, 185, S. C. Fed. Cases, 6750;
In re Thomas & Sivyer, 8 Biss., 139;
In re Whiting, 2 Lowell, 472;
In re Foot, 8 Ben, 228;
In re Ellerhorst, 8 Fed. Cases, 522-523; S. C., 5 Natl. Bankrupt Ct. Reg., 144;
Ex parte Talcott, 2 Lowell, 320;
In re Hollister, 2 Dill., 136;
Downing *vs.* The Bank, 7 Fed. Cases, 1008-1011;
In re Dunkerson, 4 Biss., 253;
Jervis *v.* Smith, 3 Bank Reg., 147;
In re Babcock, 3 Story, 393;
In re Plummer, 1 Phillips, 56;
Wilder *vs.* Keeler, 3 Paige, N. Y. Ch. 167;

The Appellant's counsel attempts to escape the uniform trend of authority on this subject, by saying that these cases are not applicable, because, by the agreements contained in the notes, the bank *must* apply upon the partnership debt, the avails of these policies. In this connection, he concedes that the guaranty of endorsement, signed by Mertens, by its terms makes all the provisions of the notes part of the guaranty itself. (Appellant's Brief on Motion to dismiss, pp. 16, 17.) Therefore, the fact that Mertens joined as maker in one note only, is immaterial.

It is too well settled to require citation of authority that the liability of the copartnership and Mertens on these obligations, is not joint, but joint and several; and that irrespective of the rule in

bankruptcy, the bank had a right to apply the collateral in payment of either the debt of the copartnership, or the individual. At the time of the filing of the petition, having made no application of the securities, it exercised the right, recognized by the settled rule in equity, and of courts of bankruptcy, to apply the proceeds thereof in exoneration of the individual debt.

Bearing in mind the conceded proposition that Mertens was, in legal effect, a maker on all of these notes by virtue of the guaranty of endorsements, reference to the terms of the notes will at once manifest the obvious error which Appellant's counsel commits.

The notes provide that in case of a sale, the holder *may* apply the residue of the proceeds "to pay one, or more, or all of the liabilities due it, *as to it shall seem proper,* whether then due or not, returning the overplus, if any, to the undersigned, who agree to be and remain liable for any deficiency" (p. 49).

Thus, instead of making it obligatory upon the bank to credit the avails upon the partnership debt as contended, *by express terms, it is given the right to apply the security "in any manner as to it shall seem proper."* In other words, the bank is given the absolute power and option to apply the security to the extinguishment of *any* particular obligation, or *any* liability whether of the makers or endorsers.

Judge Wallace in the opinion of the Court below, disposing of the copartnership claim, in part states:

> "The propriety of the disallowance of the claim against the partnership estate depends upon considerations which are peculiar to that claim and have no bearing upon the claim against the individual estate of Jacob

M. Mertens. If the securities were not the property of the partnership when they were pledged to the bank as collateral for the payment of the indebtedness, the bank was entitled to have its claim against the partnership allowed, and allowed at its face without any deduction. If they were not part of the partnership assets, they were not part of the joint estate in bankruptcy, and as to that estate the bank was under no obligation to apply or realize their value in reduction of its claim. If they were the property of Jacob M. Mertens individually, and were pledged by him, the bank would have been at liberty upon selling them to apply the proceeds to the payment of his individual debt; and, no application having been made at the time, the settled rule of equity and of the courts of bankruptcy required the application of the proceeds in exoneration of the individual estate. * * *

"There was no evidence tending to show that the policies belonged to the partnership, except the circumstance that on one occasion the partnership made an agreement pledging them to the bank for the payment of a partnership note and all other liabilities to the bank which might thereafter arise. As the policies insured the life of Jacob M. Mertens, and were payable, one to him or his legal representatives, and the other to his wife or surviving children and to him in the event of their death before his, the legitimate presumption is that the title to one of them was his absolutely, and the title to the other was in his wife, his children, and himself. *The circumstance that the partnership pledged them does not afford a scintilla of legal evidence that the title was in the partnership.* There are instruments to which the title passes by delivery, such as notes and ordinary bonds for the payment of money. Possession of an instrument of this class is presumptive evidence of title, and the holder can recover in an action upon it by produc-

ing it upon the trial, without further evidence of title. But a policy of insurance does not belong to this class of instruments, and, because possession is not *prima facie* evidence of title, no recovery can be had by the holder upon it, when not payable to him, without proof of an assignment. *The agreement pledging the policies was not even moral evidence that they were owned by the partnership, because it appears that Jacob M. Mertens joined in it individually by a separate agreement executed contemporaneously and endorsed upon its back.*

"We conclude that the claim against the partnership estate should have been allowed in full." (Italics ours.)

144 Fed. Rep., 819.

B.

The filing of the verified proof of debt established the appellee's prima facie case, and entitled it, in the absence of proof under the objections, to the allowance of the claim.

Section 57, Sub. Div. G, Act of 1898.
Whitney v. Dresser, 200 U. S., 532.

Judge Ray recently held, in *Re Castle Braid Company*, 145 Fed. Rep., 224-228, following the decision just cited:

"It is settled in Whitney *vs. Dresser* * * * in substance, *that the allegation of the proof of claim are to be taken as true.* If they set forth all the necessary facts to establish a claim, and are not self contradictory, *prima facie*, they establish the claim, even in the presence of objections, and the objector is then called upon to produce evidence and show facts tending to defeat the claim of probative force equal to that of the allegations of the proofs of claim.

The burden of proof is always on the claimant, but, as probative force is given to the allegations of the proofs of claim, and no probative force is given to the objections, this must be met, overcome, or at least equalized by the objecting party. *In short, if the proofs of claim state facts sufficient to make a prima facie case, and it is stated that there is no security, the referee is bound to allow the claim, unless evidence controverting such facts is given by the objecting party, etc.*" (Italics ours.)

See also:

Matter of Dresser, 135 Fed. Rep., 495;
In re Carter, 138 Fed. Rep., 846;
In re Cannon, 133 Fed. Rep., 837;
Matter of Shaw, 109 Fed. Rep., 782;
In re Doty, 5 Am. Bank. Rep., 58;
In re Sumner, 101 Fed. Rep., 224.

C.

No assignment of error has been filed as to the $6,000 deposit.

The Appellant will claim that the bank failed to show any right by which it applied this $6,000, except the last clause of the collateral notes, which made it obligatory upon the bank to apply this money in payment and extinguishment of the debt of the copartnership.

A perusal of the record discloses that at no stage of the proceedings, did the Appellant raise any question with reference to this money. He has failed to file any assignment of error predicated upon the bank's failure to credit this amount upon the partnership debt. It is now raised for the first time, and hence cannot be considered.

Stevenson *vs.* Barbour, 140 U. S., 48;
Rowe *vs.* Phelps, 152 U. S., 87.

Nor does the record contain the slightest suggestion substantiating the appellant's contention in this respect. Hence there is no such manifest error that this court will take notice of, even though not assigned.

U. S. *vs.* Pena, 175 U. S., 500.

Assuming, but not conceding, that the question is open for consideration, the Appellant's claim is fully answered by the statement contained in the partnership proof of debt to the effect that at the time of filing of the petition the bank held as collateral security for the payment of the debt, *which said collateral was deposited by Mertens individually,* the following described property, to wit:

> "The sum of $6,000 held on deposit with the Varick Bank of New York for the *individual* account of Jacob M. Mertens" (p. 59).

What has been said under sub-divisions A and B of this point, applies here as well.

In any event, the bank had the right to apply this deposit to the payment of the individual debt, irrespective of any agreement or right by which it was held as collateral security.

N. Y. County Bank *vs.* Massey, 192 U. S., 138;
Moch *vs.* Market St. Natl. Bank, 107 Fed. Rep., 897;
Frank *vs.* Mercantile Natl. Bank, 182 N. Y., 264;
In re Philip Semmer Glass Co., 135 Fed. Rep., 77; appeal dismissed.
See Conboy *vs.* First Nat. Bk. Jersey City, 203 U. S., 141.

D.

The doctrine of the application of payments does not apply in any sense to the partnership claim.

The Appellant in his brief under Point IV advances the argument that the partnership claim should not have been allowed, for the reason that the Bank failed to apply the $6,000 held as security on deposit to the individual credit of Mertens, and the avails of the policies. This sum, and the proceeds of the policies, he says, should have been applied in payment of the obligations held by the bank *in the order as they fell due.*

The obvious fallacy of this contention is at once manifest when attention is called to the fact that, by virtue of the terms of the collateral notes, default in the payment of any obligation held by the Bank *ipso facto* matured the entire debt. The notes provide:

> "On the non-performance of this promise, *or upon the non-payment of any of the liabilities above mentioned* * * * this note shall forthwith become due and payable."

The "liabilities above mentioned" are any and all liabilities due by the makers and endorsers to the bank, hence as the fact is, that the bank held obligations which had matured and remained unpaid before the petition in bankruptcy was filed, the bank's entire debt, by virtue of the terms of the collateral notes, became at once due and payable.

Furthermore, the Appellant fails to appreciate that by virtue of the provisions of the bankrupt act, the filing of the petition followed by the adjudication, matures all obligations held by a creditor, making them provable, whether due at the time of the filing of the petition or not.

In other words, the bankrupt act makes all the debts of the bankrupt due as of the date of bankruptcy.

Sec. 1, Sub. Div. 11, Bankrupt Act 1898;
In re Phillip Semmer Glass Co., 135 Fed Rep., 77;
Frank *v.* Mercantile National Bank, 182 N. Y., 264;
New York County National Bank *v.* Massey, 192 U. S., 138;
Mock *v.* Market Street National Bank, 107 Fed. Rep., 897.

But the root of the appellant's trouble rests in the fact that he fails to appreciate that this $6,000 and the policies were not the property of the partnership and that the bank was under no obligation to apply the property of Mertens individually to the extinguishment of the partnership debt.

III.

The sale, as disclosed by the record, was valid, and the bank thereby became vested with the title to the policies freed of the bankrupt's right of redemption.

A.

The findings and conclusions of the Circuit Court of Appeals are conclusive in this Court, and negatived the fact that the sale of the policy was fraudulent.

By the provisions of Section 25, Par. B, the jurisdiction of this Court on appeals from final

decisions of courts of appeal, must be exercised "under such rules * * * as may be prescribed by the Supreme Court of the United States * * *."

Under the power thus conferred, this Court has provided by general order XXXVI. (3) as follows:

> "3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law."

These orders have the same effect as if written in the statute, and the Court in its consideration of this case, is absolutely governed by the findings of fact of the Circuit Court of Appeals, and can only review such questions of law as are raised by these findings.

> Conboy *vs.* First National Bank of Jersey City, 203 U. S., 141-144;
> J. B. Orcutt Co. *vs.* Green, 204 U. S., 96-102.

The Bank contends that it sold the policies strictly in accordance with the rights conferred by the bankrupt in the contracts under which they were pledged; that by so doing fraud could not justly be imputed to it and that it violated no provision of the Bankrupt Law; that in fact it did precisely that which the Act gave it a right to do, and having sold the policies in pursuance of the

provisions of the contracts under which they were pledged, it follows, as a matter of law, that the value of the securities was properly ascertained.

It was conceded by the appellant that these policies were delivered to a licensed auctioneer, with instructions to sell them at public auction at the New York Real Estate Salesrooms, and that on that day, at 2 o'clock, the policies were offered for sale and sold to the highest bidder. It was further conceded that the policies were offered for sale and were sold separately; one for $7,000, and the other for $3,250.

The appellant cannot be heard to impeach the sale of these policies. He has conceded that they were sold at public auction to the highest bidder, and the District Court was not warranted in finding differently upon the conceded facts.

It is elementary that fraud must be alleged. It must be proved by him who asserts it; by evidence which is clear and satisfactory, and which is susceptible of no other construction. It will never be surmised or presumed; and where the intent of an act is as consistent with the inference of good faith, as otherwise, the Courts will never presume bad faith.

Patton *v.* Taylor, 7 How., 132;
Voorhees *v.* Bonesteel, 16 Wall., 16;
Gregg *v.* Sayre, 8 Pet., 244;
Clarke *v.* White, 12 Pet., 178;
Lalone *v.* U. S., 164 U. S., 255;
Hyde *v.* M'Faddin, 140 Fed. Rep., 433-443;
Eastern Paper Bag Co. *v.* Continental Paper Bag Co., 142 Fed. Rep., 479, 501;
Maxwell Land Grant Case, 121 U. S., 325.

The appellant did not allege or prove fraud; that the bidding was stifled, or that the time when, or the place where, the policies were sold were such as to necessarily result in sacrifice or in failure to realize proper value. He did not prove that others were prepared to purchase but did not do so by reason of lack of proper information. *He did not allege or prove that the property had any greater value than that realized at this sale,* nor that he was prepared to redeem the pledge for the benefit of the estate. He has not offered to redeem. He has not proved that any other person is prepared to pay more for the property than the bank paid for it.

The suggestions of the District Court that the bank took advantage of the situation and made a sham sale of the policies for the mere purpose of cutting off the bankrupt's equity of redemption, is conclusively met by the fact that the policies realized ten thousand two hundred and fifty dollars ($10,250) rather than a nominal sum.

The $10,000 policy numbered 252314 was at the time of the sale a simple life policy, payable to the wife of the assured, if living at his death, if not living, to his children, if any.

When the appellant filed his objections to these claims he had abandoned whatever interest he may have had in this policy, and the Court below had decided that the bankrupt might retain it free of any claim of the estate.

Long prior to the presentation of these claims for allowance, the appellant made an application for an order compelling the bankrupt to transfer to him the two policies in question, among others. The matter was referred to the same referee to find and report. *He reported that the policies in question had no cash surrender value* and that

they passed to the trustee, who is entitled to take and hold them.

Upon review before the District Court, the facts as above stated, appeared in the opinion of the learned Judge, *131 Fed. Rep., 972-3,* and the following is what he said with reference to this policy:

> "December 21, 1882, The Equitable Life Insurance Society of the United States issued its policy No. 252314, assuring the life of Jacob M. Mertens. Prior to the institution of such bankruptcy proceedings this policy had become a simple life policy, payable to the wife of the assured, if living at his death; if not living, to his children, if any; and in default of child or children to the personal representatives of the assured. THIS POLICY CONCEDEDLY IS SO CONDITIONED AND INCUMBERED, AND THE INTEREST OF THE TRUSTEE THEREIN, IF ANY, IS SO REMOTE AND UNCERTAIN, THAT IT IS OF NO PRACTICAL VALUE TO THE ESTATE, AND IT WILL NOT BE FURTHER CONSIDERED, AND THE BANKRUPT WILL BE ALLOWED TO RETAIN THE SAME." (Italics ours.)

Yet it is said the bank was guilty of bad faith; that this policy was worth more than $3,250, the amount paid by the bank, and this in face of the District Court's previous decision that the appellant's interest, if any, is so remote and uncertain that it is of no practical value to the estate.

The appellant's claim that the policies have a larger commercial value than the bank paid for them "*appears*" said the referee, "to be justified by terms of the policies themselves."

The $50,000 policy provides that in 1909 the Company will pay to the holder $18,823, provided it shall not have terminated previously by lapse or death.

The bank paid for it	$7,000.00
The interest on this sum to the end of the tontine period is	2,275.00
The bank paid the 1st premium due Feb. 15, 1904	1,735.00
The interest on this to the end of tontine period is	520.50
Second premium due & paid Feby. 15, 1905	1,735.00
Interest on same	416.40
Third premium due & paid Feby. 15, 1906	1,735.00
Interest on same	312.30
Fourth premium due and paid Feby. 15, 1907	1,735.00
Interest on same	208.20
Fifth premium	1,735.00
Interest on same	104.10
Sixth premium	1,735.00
Making a total cost to Feb. 15, 1909, of	$21,346.50

The appellant at page 31 of his brief calls attention to the record in the case No. 209, upon the present calendar of this court, as substantiating his contention that the $50,000 policy also involved in that case, was there shown to have a greater value than the bank paid for it.

To thus travel beyond the findings and conclusions and indeed entirely outside of the record in this case is highly improper, and such reference will undoubtedly be entirely disregarded by this court.

That the appellant is thus compelled to go outside this record in order to bolster up his claim that these policies had a greater value than the bank paid, more strongly indicates the error committed by the Referee and the District Court than anything counsel might say.

It will also be said that the conceded facts show the policies to have a greater value than the bank paid, because Delanoie after pledging them with the Knickerbocker Trust Co. for the amount of the purchase price, obtained a further loan thereon of $2,622.75. The explanation is obvious. The premium on the $50,000 policy is $1,735.00, and on the $10,000 policy $272.50, a total of $2,007.50, which with the accrued interest on the original loan of $10,250, represents the additional loan made by the Trust Company. Naturally the payment of each additional premium increased the value of the policies. The premiums were paid, and the additional loan procured more than six months before the bank proved its claims.

But even assuming without warrant that the policies did not realize full value, still in the absence of fraud the Court was not justified in setting aside the sale.

In *Franklin Nat. Bank of N. Y. v. Newcombe, 1 App. Div., 294,* affirmed by the Court of Appeals, *157 N. Y., 699,* upon the opinion of the Court below, a note gave the plaintiff full power to sell, assign and deliver the whole, or any part of the securities, at a broker's board, or at public or private sale, at their option without advertisement or notice, and to purchase at such sale free of the pledger's equity of redemption. The bank sold the pledge and bought the collateral at its sale for less than the amount of the debt and brought an action to recover the deficiency. The court held, that the plaintiff had a right to sell without waiting for a favorable condition of the market, that the action of the plaintiffs was strictly within the terms of the contract, and that the defendants had no reason to complain. Although it was urged that there was no necessity for selling the security at the

time chosen by the plaintiff, as it was amply secured, it was held that such a situation cannot prevail to change the rule *that a creditor has a right to collect his debt when due and that no presumption arises by reason of inadequacy in the price realized if the sale was in accordance with the terms of the contract.*

So in *Wheelwright v. St. Louis, 56 Fed Rep., 164*, it was held:

> "As to the foreclosure of the pledge, it seems to have been foreclosed in a manner strictly legal. The fact that at the sale under the foreclosure the bonds brought but little, there being no fraud shown, cannot impeach complainant's title."
>
> Guinzburg *v.* H. W. Downs Co., 165 Mass., 467.
> Learned *v.* Geer, 139 Mass., 31.
> Manning *v.* Shriver, 79 Md., 41-47.

But above and beyond all of these considerations is the paramount fact, conceded and admitted by the appellant that these policies were sold at public sale to the highest bidder and purchased by the Bank for an amount, which, for all the purposes of this case, is the only amount which the Court can find is the value of these securities.

B.

The appellant's failure to offer any evidence of the facts and circumstances attending the sale, or the value of the policies, affords a presumption that such evidence if adduced, would operate to the prejudice of his contentions that the sale was fraudulent, and the prices paid inadequate.

While it cannot be said that the evidence of the disposition of these policies was exclusively within

the knowledge of the appellant, it cannot be gainsaid that he was in a position to produce, for examination under oath, every person in any way connected with the transaction. He could, if such were the fact, establish that the bank made no attempt to sell these policies at private sale; that no information was given to the bystanders, if any there were, as to the age or situation of the insured, or the nature or character of the policies; that the amount was not stated; that there were no other persons present; that the bank made no effort to ascertain the true value of the policies; that the policies had in fact a much greater value, and hence that the amount which the bank paid was so inadequate as in itself to raise a presumption of fraud.

The appellant was content to rest his case upon the mutual concessions made, and we therefore submit that his failure to call the witnesses concerned in the transaction raises the presumption, that had he done so, their testimony would have negatived the slightest inference of fraud or bad faith.

Kirby *v.* Tallmadge, 160 U. S., 379;
Runkle *v.* Burnham, 153 U. S., 216-225;
Graves *v.* The United States, 150 U. S., 118-120;
Clifton *v.* The United States, 4 How., 242-244;
Choctaw & M. R. Co. *v.* Newton, 140 Fed. Rep., 225-238;
Gulf C. & S. F. Ry. Co. *v.* Ellis, 54 Fed. Rep., 481-483.

The Circuit Court of Appeals in its opinion said (p. 822):

"The court below regarded the sale made by the bank as a fraudulent sale. There was

no evidence of fraud, unless the facts which have been referred to justify the inference of fraud. *We are at a loss to understand how fraudulent conduct can justly be imputed to a pledgee, when it appears that whatever was done in executing the power of sale was done in full compliance with the terms of the pledge, and when there is no evidence that any unconscionable advantage was taken of the pledgor or his creditors.*

Doubtless the pledgee cannot avail himself of his authority, however unlimited, to sacrifice the property wantonly, or to purchase it himself at a valuation so inadequate as to suggest a fraudulent purpose. If the valuation in this case was unfair, the burden was on the trustee to prove the fact'' (italics ours).

144 Fed. Rep., 818.

IV.

The sale of the policies by the Bank at public auction to the highest bidder, without demand, notice or advertisement, was a valid exercise of the power conferred, effectually barring the bankrupt's right of redemption, which he had expressly waived, in the event of default in the payment of the debt.

A.

The validity of the contracts of pledge is governed by the law of the State of New York.

No federal question is involved. The contracts of pledge were made, executed and to be per-

formed in the State of New York, and the rights of the parties are governed by the law of that State.

No preference under the bankrupt act was alleged or proved, nor was there any allegation or proof that the creation of the indebtedness, or the pledge of the securities, was in fraud of the rights of the creditors or the appellant.

The question, therefore, whether, and to what extent, a pledge of this kind is valid, is a local question, and the decisions of the courts of the State of New York will be followed by this Court.

York Mfg. Co. *vs.* Cassell, 201 U. S., 344.

Thompson *vs.* Fairbanks, 196 U. S., 516-522;

Humphrey *vs.* Tatman, 198 U. S., 91;

Dooley *vs.* Pease, 180 U. S., 126-128.

B.

The contract of pledge expressly granted to the Appellant an absolute power of sale, coupled with an interest, which would have survived the death, and did survive the insolvency of the pledgor.

Of this there can be no question. The bank had under the assignment both title and possession of the policies for a period of more than two years before the filing of the petition. It has a valid debt against both the copartnership and individual estates which has never been questioned. It therefore could make a sale under the power granted and transfer title in its own name.

The leading case upon this proposition, the opinion in which was written by Mr. Chief Justice Marshall, contains such a clear exposition of the law, that further discussion becomes unnecessary.

Hunt *vs.* Rousmanier, 8 Wheat., 174;

Dixon *v.* Ewart, 3 Merivale's Rep., 322;
Corder *v.* Morgan, 18 Vesey, 344;
Knapp *v.* Alvord, 10 Paige Ch. Rep., N. Y., 205;
Houghtaling *vs.* Marvin, 7 Barb., N. Y., 412;
Hutchins *vs.* Hebbard, 34 N. Y., 24-27;
Weber *vs.* Bridgman, 113 N. Y., p. 600;
Terwilliger *vs.* The Ontario, Carbondale & Scranton R. R. Co., 149 N. Y., 86;
Conners *v.* Holland, 113 Mass., 50;
Bell vs. *Mills,* 123 Fed. Rep., 24.

In *ex parte Whiting, 2 Low., 472, Judge Lowell* reviewing the authorities said:

> "The result of them is, that a creditor who, at the time of bankruptcy, has in his hands goods or chattels of the bankrupt, with a power of sale, or choses in action with the power of collection, may sell the goods, or collect the claims and set them off against the debt the bankrupt owes him; *and this, although the power to sell or to collect would have been revocable by the bankrupt before his bankruptcy; or, in other words, the very fact of bankruptcy, in such cases, gives a sort of lien which did not exist before. This has been the law ever since Rose* vs. *Hart, 8 Taunt., 499.*" (Italics ours.)

C.

The contracts of pledge are not unconscionable or fraudulent.

The entire trend of the Appellant's argument upon this branch of the case, seems to be not that

the Bank in foreclosing the pledge, failed to comply strictly with the terms of the agreements of pledge, but that the contracts themselves are invalid, for the reason that they placed the pledgor at an unconscionable disadvantage, and hence are unenforceable as against public policy. He asserts that no authority can be cited which upholds the right of the pledgee to purchase at his own sale held without notice or advertisement. The fact is, that except in those states where the disposition of pledged property is governed by express statute, there is not a discordant note in the uniformity of decision in the various commonwealths upholding the right of the pledgee, in the absence of fraud, to buy at his own sale held without notice, demand or advertisement, when power so to do is expressly granted by the pledgor.

The decisions of the Court of Appeals of the State of New York are uniform in upholding contracts of pledge which waive the right of the pledgor to exact strict performance, on the part of the pledgee, of the common law duties of a pledgee.

Wilson *vs.* Little, 2 N. Y., 443;
Wheeler *vs.* Newbould, 16 N. Y., 392;
Milliken *vs.* Dehon, 27 N. Y., 364-369;
Stenton *vs.* Gerome, 54 N. Y., 480.

In *Baker vs. Drake, 66 N. Y., 518,* the question arose with regard to the introduction of evidence of the custom and usage prevailing in the defendant's office, who were stockbrokers, in the sale of stock without notice held on margin for customers for a failure to deposit additional margin.

The Court held:

> "The parties to the contract, however, may provide therein for any manner of disposing of the pledge to satisfy the claim upon it, which is not in contravention of a statute

against public policy, or fraudulent" (head note).

In *Williams vs. The United States Trust Co., 133 N. Y., 660,* the plaintiff pledged to the defendant certain bonds as security for a loan under an agreement which gave the pledgee,

> "authority to sell the same or any securities that may be substituted in lieu thereof, on the non-performance of the promise, in such manner as they, in their discretion, may deem proper, without notice either at the New York Stock Exchange or at public or private sale, etc."

The loan not having been paid at maturity, the defendant sold the bonds without notice. Affirming the judgment upon the opinion of the Court below, and quoting therefrom, the Court of Appeals said (p. 662):

> "The rights and relations of the parties were clearly defined in the written instrument. Whatever may have been the rights of the plaintiff, and the duties of the defendant before the maturity of the loan, it is clear and indeed undisputed that after that time it could, by the terms of the instrument, sell the bonds for the payment of any balance due it, without notice to him. Hence no wrong was done to the plaintiff by the sale of these bonds, unless the written agreement was in some way modified, or the rights of the plaintiff thereunder in some way enlarged or changed."

In *Gillet vs. Bank of America, 160 N. Y., 549,* the validity of the contract of pledge in question in this case was there upheld. The question arose between the assignee of the pledgor and the pledgee, whether the property pledged was properly held as security for the payment of a note of $5,-

000, which was made by the pledgor, but payable to a third person, and which after maturity and not in the regular business of the bank, it had purchased. In addition to this note, the bank held notes which it had discounted, amounting to $35,000, secured by the same collateral; the contract printed on the collateral notes provided:

> "On the non-performance of the foregoing agreements as to furnishing additional collateral, or the non-payment of any of the above-mentioned liabilities, then, and in either such case, the said bank is authorized to sell, assign and deliver the whole or any part of the said securities, or any substitutes therefor, or any additions thereto, or any other property at any time given unto or left in the possession of the said bank by the undersigned for safe keeping or otherwise, at any broker's board or at public or private sale, at the option of the said bank, or of either of its officers, without either advertisement or notice, which are hereby expressly waived. If such securities or property are sold at public sale, the said bank may itself purchase the whole or any part thereof, free from all right of redemption on the part of the undersigned, which is hereby waived and released."

The Court held that under the terms of the contract, the Bank had the right to sell the property pledged for the $35,000 loan, but that the $5,000 note which it had purchased was not such a debt as was contemplated to be secured by the collateral deposited, and that the bank could not apply the surplus to its payment.

In *Toplitz v. Bauer, 161 N. Y., 325,* the security deposited was a policy of insurance, and the contract of pledge incorporated in the note evidencing the debt provided, that upon non-payment, the holder could sell at public, or private sale, without notice, or advertisement, and become the purchaser, and the Court said (page 332):

"In recent times the right of the parties to enter into a contract providing for a sale or disposition, without notice, has been recognized, and the disability of the pledgee to become the purchaser, it is said, may be removed by express stipulation of the parties. The pledgee doubtless had the right to exact strict performance of the contract according to its terms, and, upon default in the payment of the debt at the time stipulated, he may under a contract like this, dispose of the pledge." (Italics ours.)

See also

Bailey *v.* American Deposit Co., 52 N. Y. App. Div., 402;

Palmer *v.* Mutual Life Ins. Co., N. Y., 38 N. Y. Misc., 318;

Genet *v.* Howland and Aspinwall, 45 Barbour, N. Y., 560;

Franklin National Bank *v.* Newcombe, 1 App. Div., N. Y., 294; (Affirmed on appeal, 157 N. Y., 699).

In *Fidelity Insurance Trust and Safe Deposit Company v. Roanoke Iron Company, 81 Fed. Rep., 439,* the collateral notes contained the same provisions as in the case at bar, except that they do not expressly give the holder the right to purchase, but did grant full power to sell at discretion.

The terms of the notes are found at page 449 of the opinion. The Court said (p. 450):

"The contention of counsel for exceptants is that Gwinner, being the pledgee for these bonds, as collateral security for the payment of the note for $5,000, executed to him by the Roanoke Iron Co., could not become the pur-

chaser thereof at a sale of the same. It is undoubtedly true that where a pledgee, without authority, sells a negotiable collateral paper, he cannot become the purchaser. Colebrooke Collat., Sec. 126. *But this doctrine does not apply in a case like this where the pledgee is given full power and authority, on the failure of the debtor to meet the obligation for which the collateral is given, to sell the collateral at public or private sale, and without advertising or giving to the pledgor, any notice or making any demand for payment.*" (Italics ours.)

See also:

Wheelwright *vs.* St. Louis, 56 Fed. Rep., 164;
McDougall *vs.* Hazelton Tripod Boiler Co., 88 Fed. Rep., 217;
Smith *vs.* Lee, 84 Fed. Rep., 557;
Atlantic Trust Co. *vs.* Woodbridge Canal Irrigation Co., 86 Fed. Rep., 975.

In *Farmers' National Bank vs. Venner, 78 N. E. Rep., 540* (Mass. Supreme Court, 1906), the note provided that the holder might sell the bonds deposited as collateral at public or private sale, in default of payment, "with the right on the part of the holder thereof to become purchaser at such sale." The note being unpaid, plaintiff *sold the securities at public auction by a duly licensed auctioneer at the New York Real Estate Salesrooms,* and bought them in at a low price. It then sued to recover the balance of its debt on the note. The Court said at page 542:

"We do not see any ground on which it can be successfully contended that there was a lack of proper care and diligence on the part of the plaintiff bank in the sale of the col-

lateral. The fact that the bonds were sold for very much less than bonds of the same issue had been sold for previously and were sold for subsequently, and the further fact, if such was the fact, that Mr. Quinlan, who bid off the bonds for the plaintiff bank, was the only bidder, do not invalidate the sale. There is nothing to show that other bidders were not present, and mere inadequacy of price is not of itself sufficient ground for setting aside a foreclosure sale. Austin *vs.* Hatch, 159 Mass., 198; Stevenson *vs.* Dana, 166 Mass., 163; Fennyery *vs.* Ransom, 170 Mass., 303. *The note provided expressly that the pledgee might purchase at any sale of the collateral, and there is nothing, therefore, in the fact that the plaintiff bank was the purchaser to invalidate the sale.*" (Italics ours.)

See also:

Guinsburg *v.* H. W. Downs Co., 165 Mass., 467-470;
Learned *vs.* Geer, 139 Mass., 31.

In *Appleton v. Turnbull, 84 Me., 72,* it appeared that the maker of the note stipulated therein that the holder, in case of default in payment, might sell the bonds deposited as collateral, at public or private sale, as he might think best.

There was no agreement waiving advertisement, or giving the holder the right to buy. The note being unpaid at maturity, the holder after giving public notice and no other bidder appearing, bought in the bonds for about one-sixth of the amount due on the note. In holding such sale, to the pledgee, to have been invalid, the court said (p. 81):

"The pledgor may lawfully stipulate that the pledgee may purchase; and this stipulation may be made at the time of the pledge."

In *Manning vs. Shriver, 79 Md., 41,* it appeared that the note given authorized the holder "to sell the collateral security at any broker's board, or at public or private sale, without advertisement or notice to me, and with the right on his part to become the purchaser thereof at such sale or sales freed and discharged of any equity of redemption."

The note not being paid at maturity, plaintiff offered the stock for sale *without advertisement at a broker's board, and there being no bid, bought it in for about one-eighth of the amount due on the note, and sued for the balance.* In affirming the judgment for plaintiff, the court said: (p. 46):

> "Then again it is argued, that the money loaned to the defendant was money belonging to Mrs. Semmers, and that the note was made payable to the plaintiff as agent, and it was as agent that he was authorized to sell and buy the stock, and thus holding a fiduciary relation to the parties, the plaintiff could not buy at his own sale. * * * But it is equally well settled that this rule does not apply where the pledgor expressly authorizes the pledgee not only to sell the pledge, but to purchase it in his own right. * * * (p. 47). The purchase by a pledgee in such cases is exempted from the operation of the general rule upon the same ground that a mortgagee will be allowed to buy at his own sale, if the mortgagor so agrees."

In *Iron City National Bank v. Rafferty, 207 Pa., 238 (1903)*, it was held, in a case where the note given on a loan of money, gave the holder the right, after default in payment, to sell the collateral security, at public or private sale, without demand, notice or advertisement, that the holder may in good faith and without negligence,

sell the security at private sale without notice or advertisement for less than its face value.

In *Jeanes's Appeal, 116 Pa., 573,* the note authorized the holder, on default in payment, to sell the collateral security, without notice or demand. After default, the holders sold the securities without notice. The debtor then filed this bill to redeem, etc. In reversing the judgment for plaintiff, the court held that the pledgees had the right to sell upon default at public or private sale without demand or notice.

In *McManus v. Sweatman, 22 Weekly Notes of Cases, 54* (Pa. Supreme Court), the note authorized the holder, on default in payment, to sell the security at a broker's board, or at public or private sale without notice, and to become the purchaser. On default in payment, the holder sold the security and became the purchaser at less than the face of the note.

The court stated the rule as follows (p. 57):

> "As holder of the note, plaintiff below had a right * * * to sell it (the collateral security), and become the purchaser himself."

In *National Bank of Illinois vs. Baker, 128 Ill., 533,* the note provided for a disposition of the collateral at either public or private sale, without notice by advertisement or otherwise. It was held by the court that parties may by contract agree that the pledge may be sold without previous notice, demand or advertisement.

In *McDowell v. Chicago Steel Works, 124 Ill., 491,* it was said at page 497:

> "But where the pledge is accompanied by a special contract as to sale upon non-payment of the debt, the right to sell is conferred, not by the law, but by the contract itself, and

hence must be exercised in the mode specified by the parties in their agreement."

And held that the contrary ruling in *Rozet v. McClellan, 48 Ill., 345,* was merely *obiter.*

In *Harris vs. Thomas, 37 Ill. App., 517,* the agreement provided that the appellee was authorized and empowered "to sell said property at public or private sale, without notice or demand of payment, at any time thereafter, for such price as he may deem best. In case of such sale, I hereby release and absolve said R. Bullen from all claims and demands of every name and nature."

An action was brought in replevin by the pledgor. It developed upon the trial that an agent of the pledgee, acting under his instructions, sold the property. The court was asked to charge that upon default, the pledgee was authorized to sell the pledge without notice to the pledgor, and that if the pledgee's agent did in fact sell the property without notice to the plaintiff, and that such sale was made in good faith, the pledgor could not recover. This the Court refused to charge. Upon appeal it was held:

> "The debt secured by the pledge was payable at a fixed time by the terms of the contract of pledge, therefore no demand of payment was necessary, and the contract expressly authorized a sale without notice. A sale of the pledge was clearly proved, and if rightfully made, under the authority in the contract, there was no conversion of the property, and all the appellee would be entitled to recover, would be what the property brought on the sale in excess of the amount loaned on it and interest thereon."

In *Cole vs. Dalziel, 13 Ill. App. 23,* the note provided that the collateral security upon default

might be sold at public or private sale with or without notice. The Court said (p. 26):

> "But in this case, the pledgee had the special power given him by the pledgor to sell the pledge, at any time before or after the debt became due, at public or private sale, with or without notice. * * * The rightful exercise of the power of sale was not dependent upon the giving of any notice whatever to the plaintiff. The notice which, in ordinary cases, would be indispensable to the right to sell the pledge, was here waived. *The sale, which it was claimed, constituted an unlawful conversion of the pledge, was not made in contravention, but in pursuance, of the express power given. The sale, so made, would undoubtedly pass a good title to the purchaser. In making it, the defendant did nothing which he was not expressly authorized to do. That being so, such sale could not amount to an unlawful conversion, and trover would not lie.*" (Italics ours.)

In *Glidden vs. The Mechanics' National Bank, 53 Ohio St. Rep., 588,* the note granted the pledgee "authority to sell the same on the non-performance of this promise, in such manner as they in their discretion may think proper, without notice either at public or private sale, *etc.*"

The Court said (p. 599):

> "This requirement of notice may be waived by the pledgor, either in the contract of pledge, or afterward; and by the agreement between the parties in this case, the bank was expressly authorized to sell the property pledged to it by Glidden, without notice."

In *Choteau vs. Allen, 70 Mo., 290,* the note provided that the pledgee might sell the pledge at a broker's board, at public or private sale, or other-

wise at their option on the non-performance of the obligation and without notice. Advertisement was not waived. Default was made, and the property was sold at public auction in the City of New York; the pledgees became the purchasers. The Court held in substance, that the rule that the pledgee of personal property before selling, must demand payment of the pledgor, or give him notice of the time and place of the intended sale, may be waived by agreement between the parties, and has no application to cases where by the contract, a definite time is fixed for the payment of the debt. In either of these cases, sale may be made without notice or demand; and that the rule that the pledgee cannot buy at his own sale of pledged property, may be waived by express agreement of the parties.

In *Carson vs. Iowa City Gas Light Co., 80 Iowa, 638*, the contract of pledge permitted the pledgee upon a failure to pay the loan when due, to sell the shares without advertisement, or notice, at public or private sale. The loan being unpaid, the pledgee sold the collateral at private sale without notice for $7,000, the par value was $50,000.

The Court said, at page 645:

> "But, where the parties stipulate in the writing making the pledge that the sale may be private, without notice, and without demand, a sale made in the manner provided for by the contract is valid. * * * There is no reason why the parties may not waive the requirements of demand and notice."

In *Dullnig vs. Weekes, 16 Texas Civil Appeals, 1*, it was held that a power of sale contained in a note given on the loan of money, authorizing a private sale of the bonds deposited as collateral

security, "without advertisement or notice, authorized a sale without notice, *either to the public or to the pledgor.*"

In *Barry Bros. v. White Lead & Color Works, 107 La., 236,* it was held that a pledgee of bonds under a contract providing for a sale thereof at public or private sale, on default in payment, with privilege to the pledgee to become the purchaser, authorized the pledgee to buy in the bonds at such sale.

The Court below in this branch of the case said (p. 821):

> "The bank's claim against the individual estate was for an indebtedness of $9,118, the balance alleged to be due from Jacob M. Mertens, after crediting his account with the proceeds of the sale of the two policies which had been pledged to the bank as collateral for the payment of the indebtedness. The pledge was made long prior to the filing of the petition in bankruptcy, and it is not asserted that it was preferential. By its terms the bank was authorized, upon default in the payment of any part of the indebtedness, to 'sell, assign, or otherwise dispose of the said collateral security at public or private sale, with or without notice to the pledgor,' and to 'purchase the whole or any part of the property sold free from any right of redemption' on the part of the pledgor. After the petition in involuntary bankruptcy, and on September 14, 1903, the bank caused the two policies to be sold by an auctioneer at a public salesroom, without any notice having been given to any person except its own agents. There was no competition at the sale, and upon the bid of its own agent the bank became the purchaser for the sum of $10,250. *No testimony was offered by the trustee to show that the value of the policies was greater than the amount of the bid, and there is no evidence in the record of the value independently of the bid.*

If this was such a sale as was authorized by the terms of the pledge, we do not doubt that the bank in making it was within its rights, and that no rule of the common law or doctrine of equitable jurisprudence, and none of the provisions of the Bankrupt Act, can be invoked to defeat or invalidate it.

Except for the terms of the pledge, the sale would have been voidable; if for no other reason, because the bank purchased the policies (Story on Bailments, § 319). But in this respect, as also with respect to a private sale without notice, the pledgor had by his contract consented in advance to that which was done by the bank. Indeed, by the stipulation of such a pledge as this was the pledgor in effect commits the disposition of his property, in case of his failure to pay his obligation, practically to the honor of the pledgee, and releases the pledgee from all the legal obligations which would ordinarily rest upon him in disposing of the property to satisfy his demand. The authorities sanction such contracts. In Baker *v.* Drake (66 N. Y., 518) it was decided that the parties to a transaction which creates the relation of pledgee and pledgor between them, may provide by contract for any manner of disposing of the pledge to satisfy the claim upon it, which is not in contravention of a statute, against public policy, or fraudulent. In Toplitz *v.* Bauer (161 N. Y., 332) the court said: 'In recent times the rights of the parties to enter into a contract providing for a sale or disposition without notice have been recognized, and the disability of the pledgee to become a purchaser, it is said, may be removed by express stipulation of the parties.' In Williamson *v.* United States Trust Co. (133 N. Y., 660), where the terms of the pledge authorized the pledgees to sell the securities 'in such manner as they in their discretion may deem proper, without notice,' the sale without notice was upheld. In Fidelity Insurance Co. *v.* Roanoke Iron Co. (81 F. R., 440) it was de-

cided that the holder of collateral security for a debt, who had been given by the terms of the pledge full power and authority, on failure of the debtor to pay, to sell the collateral at public or private sale, and without advertising or giving the pledgor any notice or making any demand for payment, may buy such collateral, at a sale conducted in good faith, and thereby acquire a good title. The court said: 'It is undoubtedly true that where a pledgee without authority sells negotiable collateral, he cannot become the purchaser; but this doctrine does not apply in a case like this, where the pledgee is given full power and authority, on the failure of the debtor to meet the obligation for which the collateral is given, to sell the collateral at public or private sale, and without advertising or giving to the pledgor any notice or making any demand for payment. * * * It would be imposing great hardship and injustice upon the pledgee, under the circumstances of this case, to say that while acting under the authority given him by the pledgor, and in good faith, he shall be required to stand by and see the only security he has for the payment of his debt perhaps sacrificed, and he not permitted to protect his interests in the only way he can, by becoming the purchaser himself.' It will be noticed that in that case there was no stipulation authorizing the pledgee to become the purchaser. See also Manning *v.* Shriver (79 Md., 41); Appleton *v.* Turnbull (84 Me., 72); Chouteau *v.* Allen (70 Mo., 290). It may happen that a pledgee will be unable to obtain from others the sum which he believes he may be able to realize from the property by purchasing it himself, and disposing of it when a favorable opportunity offers. If the pledgor sees fit to consent to a stipulation like those in this case, there would seem to be no reason why he should not be held to the contract."

V.

The referee had no power to direct a resale of the policies, as they had been properly liquidated by the bank under the provisions of Section 57, subdivision H of the Bankruptcy Act.

A.

The District Court erred in its construction of this section.

Sub-division H of Section 57 provides:

> "The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the Court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance."

The District Court in its opinion, said:

> "It is evident that the Act contemplates a determination of the value of securities held by secured creditors in one of two ways—either by converting the same into money, according to the terms of the agreement pursuant to which such securities were delivered to such creditors, or by the joint action of the creditors and trustee pursuant to an agreement, arbitration, compromise, or litigation entered into by them; *and that the Court may direct the ascertainment of the value of such securities in either manner*" (fol. 48, p. 26). (Italics ours.)

If this construction is correct, the Court could, if it saw fit, entirely disregard the method prescribed by the parties, and direct that the securities be disposed of, either by agreement between the creditor and the trustee, arbitration, compromise or litigation.

To construe Subdivision H of Section 57 as investing the Court with power to prescribe a method of disposing of the pledge, different from that agreed upon between the parties, would result in depriving the creditor of vested rights, and is in contravention of the provisions of Subdivision D of Section 67, which expressly exempts from the operation of the law, contracts of pledge which are *bona fide*.

It was never intended by Congress that the Court should have the right to prescribe a different method of disposing of the pledge than the one agreed upon by the parties. The correctness of this contention is at once manifest when we analyze this subdivision. It provides:

> "That the value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors."

If we stop here, there can be no doubt that a perfect and complete mode of disposing of the pledge is thus provided for; but Congress recognizing that pledges of personal property are frequently made, without any express agreement for a disposition thereof, and contemplating the possibility of disputes as to how the pledge should be disposed of, or its value ascertained, provided that the creditor and the trustee may either by agreement, arbitration or compromise arrive at the de-

sired result; or if agreement, arbitration or compromise is impossible, then by litigation.

The Court by this subdivision is only given the power to direct a disposition of the pledge, or the ascertainment of its value, *if the parties have failed to do so by their own agreement, and then only as provided by this subdivision.*

The phrase "as the Court may direct" has no grammatical or logical relation to the opening phrase: "the value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors." It limits and applies to that which follows the preposition "or," *i. e.*, "by such creditors and the trustee, by agreement, arbitration, compromise or litigation." That this is the correct analysis is plain when the phrase "as the Court may direct" is transposed as though it read:

> "The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities are delivered to such creditors; or, as the Court may direct, by such creditors and the trustee by agreement, arbitration, compromise or litigation."

That we are correct is further apparent from the fact that if the Court could, irrespective of the contract rights of the creditor, direct a different method of disposition, the language "the value of securities held by secured creditors, shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors" becomes surplusage. It would be immaterial what method the parties themselves

agreed upon, because the Court, notwithstanding, would have the right to direct that the pledge be disposed of otherwise.

But it is most respectfully submitted that subdivision H of Section 57 only becomes operative in the event *that the securities have not been disposed of by the creditor at the time he seeks to prove his debt.* If he has disposed of his securities before filing a claim, he has no securities to liquidate. If he was himself the purchaser under a contract granting him that right, he holds the absolute title free of the equity of redemption and sets off the proceeds against the debt.

We do not contend that the Court is without power to disregard a dispostion of the pledge which is fraudulent, or contrary to the terms of the contract under which the securities were delivered to the creditor. That is another question. But if the dispositon of the securities *prior* to the time of the filing of the claim is strictly within the legal rights conferred, the Court is not at liberty to disregard what the parties themselves provided for, and upon the faith of which the creditor has advanced his money.

The Act of 1867 did not provide for a valuation of securities held by a secured creditor in accordance with the terms of the agreement under which the securities were pledged. Under that act, a creditor seeking to prove a claim thus secured, could only liquidate his security under the direction of the court. Failing to do so, he was precluded from proving his claim, or participating in the distribution of the estate.

Section 20, Act of 1867;
McHenry La Société Française D'Epargnes, 95 U. S., 58.
Davis *vs.* Anderson, 6 N. B. R., 146 Fed. Cases, 3623;

In re California Pacific Railroad Co., 3 Sawy., 240, s. c., 11 N. B. R., 193;
Smith *vs.* Kehr, 2 Dill, 50, s. c., 7 N. B. R., 97;
In re Morrison, 10 N. B. R., 105 Fed. Cases, 9839.

Notwithstanding, it was uniformly held as will be seen in a subsequent subdivision of this brief, that even where there was no express stipulation in the contracts of pledge, the pledgee might sell on default of the pledgor, such right being presumable from the nature of the transaction, and that nothing in that Act took away any right from the pledgee secured to him by his contract.

Jerome v. McCarter, 94 U. S., 734.

Mr. Justice Ray evidently recognizing his error, has since adopted the construction for which we contended.

In re Castle Braid Co., 145 Fed. Rep., 224.

The Court below, in its opinion upon this point, said (p. 823):

> "That Congress did not intend that lienors or pledgees should be prejudiced in enforcing their rights by the commencement of the proceedings in bankruptcy is indicated by the change made in the present Act with respect to the proof of claims by secured creditors. By the former Act it was provided that a secured creditor should be admitted as a creditor only for the balance of his debt, after deducting the value of the pledged property ascertained by an agreement between him and the assignee in bankruptcy, or by a sale under the direction of the Court. Under that pro-

vision, if a pledgee sold the pledged property prior to the appointment of the assignee, or without the permission of the court, he was precluded from proving his claim or obtaining any share of the bankrupt's estate to which he would otherwise have been entitled. The present Act provides that the value of his security may be determined, among other methods, by converting it into money pursuant to his contract rights, and thus, if he has enforced it as the contract with the debtor allowed, he is permitted to prove the unsatisfied balance of his claim. Section 57, Subdivision H, prescribes several modes of valuation, and the one referred to is exclusive of the others and is superfluous and useless, unless it is intended to authorize the creditor, without interference by the trustee of the court, to value his own security, provided he turns it into money 'according to the terms of the agreement pursuant to which' it was delivered to him."

144 Fed. Rep., 818.

B.

The rule that the burden of proceeding was upon appellant, was not affected by the fact that the claim against the individual estate is secured.

Attention has been called on p. 21 of this to the authorities which maintain the proposition that the burden of proceeding in the first instance rested upon the appellant to sustain his objections.

It will be said that these cases do not apply, because they do not deal with secured claims, and further that whatever the rule in this respect might be in the first instance, it cannot be invoked by the bank because upon the hearing, it voluntarily chose to proceed, and did so by submitting the stipulations of fact.

The appellant's first criticism is met by the decision of Mr. Justice Ray, *In re Castle Braid Co.*, 145 Fed. Rep., 224. There, speaking of a secured claim, he said (p. 229):

> "In regard to the claim of Meyer W. Schloss and Joseph W. Schloss jointly on the contract of agreement in question, I am of the opinion that, under Sub-division H of Section 57 of the Bankruptcy Act, the mode of ascertaining the value of the securities held by the claimants (the mode not being fixed by any agreement between the parties in interest) is discretionary with the Court. *But this does not affect the general and broader question as to whether or not the burden of proceeding to prove their claim rests now upon the claimants.* * * * (and at p. 233) As the corporation had the benefit of full performance by the claimants,and there has been no rescission or restoration or offer to restore, and no fraud or unfairness is apparent on the face of the contract, *it seems clear a valid claim, prima facie, is made out by the proofs, and that the burden of proceeding in the contest, not of proof, now rests on the trustee contesting. The authorities are that way.* * * * (and at p. 235) The question submitted is therefore answered that the burden of proceeding now rests upon the trustee contesting, and not upon the claimant" (italics ours).

In regard to the appellant's second criticism, it is sufficient to state, that the concessions were *mutual*, and in no way affected the question of the burden of proceeding.

The appellant was not content to abide by his motion for a disallowance of the claims, and thus rely upon what he terms a motion for non-suit. He went further and by moving the Referee to direct a re-sale, he clearly evidenced his purpose to rest his case without affirmative proof and seek judgment absolute on the merits.

C.

The referee had no power to divest the bank of its title to the policies and direct a re-sale.

The Referee, as stated, not only refused to allow the claims, but went further, and assumed, against the bank's objections, to adjudicate its title to the policies, and decreed a re-sale (fols. 21-22).

The question of the bank's title was in no sense an incident to the proof of the claim. The bank, by offering its claim for allowance, did not thereby submit to the Court's jurisdiction the question of title. Undoubtedly if the evidence justified a finding that the sale was fraudulent, the Court had power to refuse to allow the claim and thus prevent the bank from participating in a distribution of the estate. But it had no authority to adjudicate that the Bank obtained no title to the policies and decree that they be resold. The Bank was an adverse claimant, and had the right to have litigated by a plenary action in a Court of competent jurisdiction its title to the policies.

In *Fitch* v. *Richardson,* 147 Fed. Rep. 197, a creditor holding as security a lease running to his debtor, on its expiration obtained a renewal to himself without the debtor's knowledge. The creditor filed a claim as unsecured against the estate of the debtor. The allowance of the claim was objected to by the Trustee on a petition for reconsideration, alleging that the creditor held the lease as collateral for the debt, and by which it had been paid in full. The District Court sustained the trustee's position, finding not only, that the claim offered was secured, but valued the security in a sum in excess of the amount of the claim entering judgment against the creditor for

that amount, resting the judment on the proposition that the creditor had appropriated the security to his own use, and that according to the rules of equity practice, the question with reference to the proof of the claim involved a determination of all other questions incidental thereto.

From this decree, the creditor appealed. The Circuit Court of Appeals reversing the District Court, held (p. 198):

> "The other question on this record arises from the fact that the District Court not only found that the claim offered in proof was secured, but valued the security at $1339. in excess of the claim, and entered judgment against the creditor for that amount. * * * But the judgment by which the District Court ordered the creditor to pay the amount named was against an adverse claimant, and therefore was within the decision of Bardes vs. Hawarden Bank, 178 U. S., 524, and other decisions of that class, holding that a court sitting in bankruptcy has no jurisdiction over an adverse claim without the consent of the parties; and it was not within Pirie *vs.* Chicago Co., 182 U. S., 438, where the order to return dividends received was purely an incident to the proof of a claim which had been rejected.
>
> It is true that in bankruptcy proceedings questions of right are governed by the rules of chancery; but the practice of courts in bankruptcy with reference to topics like that before us is statutory.
>
> The nature of their powers with regard to the matters to which this appeal relates is expressed by Paragraph 6 of General Orders xxi, limiting proceedings with reference to a reconsideration of claims to the mere matter of expunging or diminishing them. This, of course, is subject to the right of the courts in bankruptcy, on a proper proceeding, to liquidate property found in the possession of

> the bankrupt, as provided by Section 38, or as otherwise provided by law; but nothing anywhere gives them jurisdiction to enter a decree against a creditor for the excess value of property held as security in the matter and under the circumstances which this recor brings before us."
>
> First National Bank of Chicago *vs.* Chicago Title & Trust Co., 198 U. S., 280.

Should it be claimed that the order, directing a resale is not a part of the record and was not considered below, it is sufficient to call the court's attention to the following.

The order directing a resale appears at (fol. 41). At folio 43, it appears that the District Court considered the order. At folio 78 it appears that the orders appealed from affirmed orders and rulings of the Referee refusing to allow the claims and directing that the value of the securities be determined by a resale at public auction. The Court below found:

> "Thereupon the trustee asked the Court under Subdivision H of Section 57 of the Bankrupt Act to direct a resale of the policies upon notice to the trustee, to which the claimant objected as not being authorized by the bankruptcy act or practice. Subsequently the Referee granted such motion. (9th Finding, fol. 116, p. 66.)"

D.

The Circuit Court of Appeals did not err by directing the allowance of the claim against the individual estate.

It will be said that the Court below should have remitted the case with instructions to permit the Appellant to introduce evidence.

There is no merit in this, for the reason that the Appellant had his day in Court, and failed to avail himself of the opportunity to substantiate his objections by affirmative evidence.

The Appellant wholly disregards in this connection, the fact that he did not remain content with his motion for a disallowance of the claims, but rested his case by moving for judgment absolute on the merits, which was granted by the Referee by directing a resale.

The *Matter of Livingston, 144 Fed. Rep., 971,* cited by the Appellant in this connection, is clearly distinguishable. There the claimant voluntarily *assumed* the burden of proceeding, and at the close of his *prima facie* case, the trustee moved that the claim be disallowed. The Referee granted the motion and disallowed the claim. The District Court reversed the Referee's order and directed that the claim be allowed as filed. This, upon appeal, was held error, because by such disposition, the claim was allowed without any opportunity to the trustee to put in what proof he might be able to produce tending to controvert the case made by the claimant.

VI.

The filing of the petition and the appointment of the appellant as trustee did not divest the Bank of any of the rights or remedies secured to it by the contracts of pledge.

A.

The Appellant, as trustee, obtained no better title to, or greater rights in the property of the bankrupt, than the bankrupt or his creditors had as of the date of the adjudication.

The Appellant's title as trustee, is conferred and governed by the provisions of Section 70 of the Act of 1898.

This section consists of Paragraphs A to F inclusive, of which "A" and "E" need only be noted.

Paragraph "A" it will be observed, contains, after the opening sentence, six subdivisions, and so far as material provides:

> "The trustee * * * upon his appointment and qualification, * * * shall in turn be vested by operation of law with the title of the bankrupt, *as of the date he was adjudged a bankrupt,* * * * to all * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him; * * *." (Italics ours.)

Paragraph E, of the same section, provides:

> "The trustee may avoid any transfer by the bankrupt of his property which any

> creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value *prior to the date of the adjudication.* Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value * * *." (Italics ours.)

It must always be remembered that the validity of the debt, and the transfer of the collateral as security for its payment, has never been questioned. When the petition was filed, the bank had a valid lien upon these policies for the payment of its debt. The contracts under which they were pledged, are, as we have already shown, valid and enforceable under the law of the State of New York where the debt was incurred and the lien created.

The Bankrupt Act does not attempt by any of its provisions to deprive a lienor of any right or remedy which the contract, valid under the law of the State where made, vested him with. In fact, the lien thus created, is expressly exempted from the operation of any of its provisions.

This is clearly indicated by the language of Section 67, Subdivision D, which provides:

> "Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

In *New York Economical Printing Company, 110 Fed. Rep., 514,* the Court, construing the title of the trustee, said (p. 518):

> "The Bankrupt Act does not vest the trustee with any better right or title to the

bankrupt's property than belongs to the bankrupt or to his creditors *at the time when the trustee's title accrues.* The present Act, like all preceding Bankrupt Acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors, shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the Act, which is fraudulent as to creditors, or invalid as to for want of record, it is invalid as to the trustee; and if it is one which is invalid as to some particular creditor, though valid as to other creditors, the trustee is in certain cases subrogated to the rights of that creditor." (Italics ours.)

In *Hewit v. Berlin Machine Works, 194 U. S., 296,* the bankrupt obtained possession of certain machines upon conditional sale, title to remain in the vendor until paid for. The machines came into the possession of the trustee. Thereupon the vendor sought to obtain possession but the referee held that it had lost its lien because of a failure to comply with Section 12, Chapter 418 of the Laws of 1897, State of New York, requiring that the bill of sale be filed.

The District Court, upon review, reversed the referee. Thereupon the trustee appealed to the Circuit Court of Appeals which affirmed the District Court. This Court affirming the Circuit Court of Appeals, said (p. 302):

> "The District Court, Hazel, J., held that the reasonable construction of this provision was that the trustee was vested with the title which the bankrupt had to property situated as described, and not otherwise, and quoted from the opinion of the Circuit Court of Appeals for the Second Circuit in the case of *In re New York Economical Printing Company, 110 Fed. Rep., 514,* upholding that view" (quoting the excerpt above).

"And the Circuit Court of Appeals, adhering to that decision, held in this case that, in as much as by the New York Statute a conditional sale such as that in question was void only as against subsequent purchasers or pledgees or mortgagees in good faith, the District Court was right, and affirmed the judgment. *We concur in this view which is sustained by decisions under previous bankruptcy laws.*" (Italics ours.)

In re Garcewich, 115 Fed. Rep., 87-89;

In re Kellogg, 118 Fed. Rep., 1017.

In *Thompson v. Fairbanks, 196 U. S., 516*, the question arose with reference to the enforcement of a lien acquired by the mortgagee taking possession, with the consent of the mortgagor, of after-acquired property covered by a valid mortgage made and recorded prior to the passage of the Act, possession being taken, however, within four months of the filing of the petition in bankruptcy, while the mortgagor was insolvent and was considering going into bankruptcy.

The Court said, referring to the provisions of the Act of 1867 (p. 526):

"Under that law it was held that the assignee in bankruptcy stood in the shoes of the bankrupt, and that 'except where, within a prescribed period before the commencement of proceedings in bankruptcy, an attachment has been sued out against the property of the bankrupt, or where his disposition of his property was, under the statute, fraudulent and void, his assignees take his real and personal estate, subject to all equities, liens and incumbrances thereon, whether created by his act or by operation of law.'" (Citing cases.)

"Under the present bankrupt act, the trustee takes the property of the bankrupt, in cases

unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provisions of the Act. * * * (And at page 525.)

"There is a distinction between the bald creation of a lien within the four months, and the enforcement of one provided for in a mortgage executed years before the passage of the Act, by virtue of which mortgage and because of the condition broken, the title to the property becomes vested in the mortgagees, and the subsequent taking possession becomes valid, except as above stated. A trustee in bankruptcy does not in such circumstances occupy the same position as a creditor levying under an execution, or by attachment, and his rights, in this exceptional case, and for the reasons just indicated, are somewhat different from what they are generally stated."

In *Humphrey v. Tatman, 198 U. S., p. 91,* the question arose whether the taking possession of after-acquired property, within four months of the filing of the petition in bankruptcy, under a mortgage made in good faith prior to that period, is good or void as against the trustee in bankruptcy. *The mortgage was not recorded and the goods remained in the possession of the mortgagor.* Within four months of the filing of the petition, the mortgagee, having reasonable cause to believe that the mortgagor was insolvent, took possession of the goods under the terms of the mortgage, although against the wishes and protests of the mortgagor.

The Court held upon the authority of *Thompson v. Fairbanks, supra*:

"Whether the taking possession of after-acquired property within four months of the filing of the petition in bankruptcy, under a mortgage made in good faith prior to that period, is good or is void as against the trustee in bankruptcy, depends upon whether it is good or void according to the law of the State." (Head note.)

See also—

York Manufacturing Co. *v.* Cassell, 201 U. S., 344.

But it will be said that there is no distinction between the act of 1867 and 1898 as to the time when the trustee's title vests. This is incorrect.

Under the former act, no reference was made to the date of the adjudication as effecting the vesting of the trustee's title. It provided that as soon as an assignee was appointed and qualified, the judge or register should by instrument assign and convey to him all of the property of the bankrupt:

"*And such assignment shall relate back to the commencement of the proceedings in bankruptcy,* and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee." (Italics ours.)

U. S. Rev. Stat., Section 5044.

Comparison between this section and 70A (5) of the Act of 1898, will disclose that in the latter, there is omitted the provision that the trustee's title "shall relate back to the commencement of the proceedings in bankruptcy," *i. e.*, the filing of the petition.

To sustain the appellant's contention, and hold that the time when the trustee's title vests is the

same under both acts, would result in obvious violence to the language employed in the later act, and utterly fail to give weight to the omission of the italicized phrase found in the earlier law.

It is a cardinal rule of construction that when the purpose of a prior law is continued, usually its words are, and an omission of the words implies an omission of the purpose.

Bardes *v.* First National Bank of Hawarden, 178 U. S., 524;
Pirie *v.* Chicago Title & Trust Co., 182 U. S., 438-448.

Referring to section 70 of the Act of 1898, the House Committee on Judiciary in its report, said:

> "Under section 70 an important change has been made from the former laws, as well as from proposed legislation. Under the act of 1867, as interpreted by the Courts, it was held that the title of the bankrupt's property vested in the assignee *as of the date of the filing of the petition in bankruptcy.*
>
> This bill provides that the trustee shall 'be vested by operation of law with the title of the bankrupt *as of the date he was adjudged a bankrupt.*' By this change, the alleged bankrupt can sell and convey a perfect title up to the date of the adjudication, and the purchaser does not buy at his own risk and in danger of having secured an imperfect title by reason of an adjudication which may be made subject (subsequent) to the purchase. It does not follow that because a petition is filed against a person in a bankruptcy court, he will be adjudged a bankrupt, and it seems but proper that the public in dealing with him until he is adjudged a bankrupt should deal without fear of loss or danger as to title." (Italics ours.)

House Report No. 1228, 54th Congress, 1st Session, p. 14.

It will also be said that by virtue of Subdivision 5 of Section 70A, the trustee takes title to all property which, on, or prior thereto, he could have transferred, or which might have been levied upon under process against him.

This argument is predicated upon the erroneous assumption that Subdivision 5 amplifies the opening sentence of Paragraph A, and extends its operation so as to relate back to the date of the filing of the petition as to the time when the trustee's title vests to the property referred to in that Subdivision.

A moment's consideration will at once disclose the incorrectness of this construction.

This paragraph treats of two separate subjects:

First.—The time when, or at which the title to something vests in the trustee.

Second.—The "something" or property, the title to which is to vest in the trustee.

In other words, the trustee is vested with the title of the bankrupt as of the date of the adjudication, but by Subdivision 5 to such property which prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon, or sold under judicial process against him. This subdivision limits the particular kind of property, but even as to this, the trustee's title vests as of the date of the adjudication.

Subdivision 5 of Paragraph A of this Section, as well as the others numerically designated, simply specify the character of the property to which the title of the bankrupt shall vest, but in

no sense operates as to the time when it shall vest.

Congress's intention to depart from the provisions of the prior act, and the decisions under it, is further plainly shown by subdivision "E" of the same section, which provides that the trustee may avoid any transfer which any creditor might have avoided, unless the person to whom the transfer was made was a *bona fide* holder for value *"prior to the date of the adjudication."* Thus unmistakably indicating that the bankrupt notwithstanding the filing of the petition might in good faith and for value, sell or encumber his property at any time prior to adjudication.

Hewitt *v.* Berlin Machine Co., 194 U. S., 296-302.

B.

The filing of the petition did not suspend or enjoin the exercise of the power of sale conferred by the contracts of pledge.

As we have pointed out, the title of the trustee in bankruptcy, under the provisions of the Act of 1867, vested as of the date of the filing of the petition. Notwithstanding this fact, however, the authorities were uniform that a pledgee is not deprived of the right to sell the pledged property upon default in the payment of the debt in accordance with the terms of the contracts of pledge.

Jerome vs. McCarter, 94 U. S., 734, is absolutely decisive and controlling.

There certain mortgaged bonds had been pledged as collateral security for loans. Bankruptcy proceedings intervened and a receiver was appointed. Subsequently the bonds were sold by

the pledgees and the contention was made that the pledgees could not dispose of the pledge after the adjudication in bankruptcy. The Court said:

> "THERE IS SOME PROOF THAT, WHEN THE COMPANY BECAME BANKRUPT (Aug. 28, 1872), SOME OF THE BONDS WERE HELD AS COLLATERALS FOR LOANS MADE TO THE COMPANY SMALLER IN AMOUNT THAN THE BONDS PLEDGED. BUT THE BONDS WERE SUBSEQUENTLY SOLD BY THE PLEDGEES, AND THE PRESENT HOLDERS HOLD THEM BY ABSOLUTE RIGHT. THE POSITION THAT THE PLEDGEES COULD NOT SELL THE PLEDGE AFTER THE ADJUDICATION IN BANKRUPTCY, IS QUITE UNTENABLE. IT IS SUSTAINED BY NOTHING IN THE BANKRUPT ACT. THE BONDS WERE NEGOTIABLE INSTRUMENTS. THEY PASSED BY DELIVERY, AND EVEN WHERE THERE IS NO EXPRESSED STIPULATION IN THE CONTRACTS OF PLEDGE, THAT THE PLEDGEE MIGHT SELL ON DEFAULT OF THE PLEDGER, SUCH A RIGHT IS PRESUMABLE FROM THE NATURE OF THE TRANSACTION. CERTAINLY THE BANKRUPT ACT HAS TAKEN AWAY NO RIGHT FROM A PLEDGEE SECURED TO HIM BY HIS CONTRACT."

It further appeared in that case that some of the bonds were still held by the pledgee and the plaintiff sought to prevent the dispositon thereof. The Court said:

> "In regard to the bonds covered by the McCarter mortgage, which is the one now in suit, we find no error in the decree of which the appellants can complain. Most of those bonds, though at first issued as collaterals for loans made to the mortgagors, have been sold and they are now owned by the purchasers. THERE ARE SOME, IT IS TRUE, THAT ARE STILL HELD IN PLEDGE; BUT THE PLEDGEES HAVE A CLEAR RIGHT TO USE THEM, EITHER BY SALE OR BY COLLECTION, UNTIL THE FULL AMOUNT OF THE DEBT DUE FROM THE MORTGAGORS IS SATISFIED."

See also:

Cook *v.* Tullis, 18 Wall., 332;
Gibson *v.* Warden, 14 Wall., 244;
Marshall *v.* Knox, 16 Wall., 551;
Avery *v.* Hackley, 20 Wall., 407;
Clark *v.* Iselin, 21 Wall., 360;
Eyster *v.* Gaff, 91 U. S., 521;
Sawyer *v.* Turpin, 91 U. S., 114;
Yeatman *v.* The New Orleans Savings Inst., 95 U. S., 764;
Stewart *v.* Platt, 101 U. S., 731;
Davis *v.* Friedlander, 104 U. S., 570;
Hauselt *v.* Harrison, 105 U. S., 401;
Adams *v.* Collier, 122 U. S., 382-390;
Bacon *v.* International Bank of Chicago, 131 U. S., CCXVI;
In the Matter of Irving, Blatch., J., 8 Ben., 463;
Sedgwick *v.* Grinnell, 9 Ben., 429;
Mitchell *v.* Winslow, 2 Story, 630;
In re Grinnell, 9 N. B. R., 137, s. c. Fed. Cases, 5829;
McGready *v.* Harris, 9 N. B. R., 135;
Fidelity Insurance Trust & Safe Deposit Co. *v.* Roanoke Iron Co., 81 Fed. Rep., 439;
Laughlin *v.* Calumet & Chicago Canal & Dock Co., 65 Fed. Rep., 441;
Fisher *v.* Lewis, 69 Mo., 629.

We might very well rest the discussion upon the authority of *Jerome* vs. *McCarter* and cases cited, were it not for the fact that it will be said that while the bank may have had the right to dispose of the pledge without notice *after* the adjudication, its right to do so *before* the adjudication was suspended by virtue of the filing of the petition, and until the adjudication.

There is no provision of the act, or decision under it, which justifies such an argument in a case of this character. In fact, *Jerome* vs. *McCarter* is diametrically opposed to it, holding as it does in express terms "that even were there no express stipulation in the contracts of pledge that the pledgee might sell *on default*, such a *right* is presumable from the nature of the transaction. Certainly the bankrupt act has taken away no right from the pledgee secured to him by his contract."

That the pledgee might sell *on default* does not mean that his rights are suspended pending a petition for an adjudication which might or might not occur. He is not called upon to sit idly by and await the pleasure of the parties to the litigation, or hazard his security by the possible delays attendant upon bankruptcy proceedings.

The appellant will attempt to sustain his position, by quoting an expression contained in the decision of this Court in the case of *Mueller* vs. *Nugent*, 184 U. S., 1-14 and kindred cases. It was there said:

> "It is as true of the present law as it was of that of 1867, that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction. Bank *vs.* Sherman, 101 U. S., 403."

To excerpt a single sentence from a judicial opinion and construe and interpret it apart from the context of the opinion in which it is found, and without regard to the subject matter under discussion is not only unreasonable, but at times, leads to erroneous conclusions.

Fealey *vs.* Bull, 163 N. Y., 397-401.

The language of *Mueller* vs. *Nugent*, and *Bank* vs. *Sherman* has no application to a case like this.

It is only such property of the bankrupt as is in his possession, or in the possession of some one for him, *not held under adverse claim or title, that is affected by the filing of the petition in bankruptcy. This is clearly manifested when the facts of those cases are examined.*

Bank vs. *Sherman* arose under the act of 1867, which vested the trustee with title as of the date of the filing of the petition, and was decided in February, 1880. It was there sought to reach certain securities transferred by the bankrupt to secure promissory notes executed before the petition was filed.

The petition was filed on the 23rd day of February, 1875. The securities in controversy were transferred on the 20th of March, 1875. The adjudication followed on the 12th of July, 1875, hence the Court properly held that the title to the securities transferred subsequent to the date of the filing of the petition, vested in the assignee as of the date of the filing of the petition, to wit, on the 23rd of February, 1875. There the bankrupt himself after the filing of the petition, undertook to dispose of his securities. Here the policies had been assigned two years before. The bankrupt after the filing of the petition did nothing whatsoever with respect to the policies. The Bank, on its own initiative, sought merely to enforce its contractual rights.

Bank vs. *Sherman* did not overrule or intend to limit to doctrine earlier enunciated in *Jerome* vs. *McCarter*, decided March, 1877.

In *Mueller* vs. *Nugent*, the petition was filed on the 19th day of February, 1900. The order of adjudication was entered on the 23rd of March, 1900. Subsequently the trustee applied for an order against the bankrupt, directing him to turn over to the trustee the sum of $14,435.45, which

it was alleged was held by William T. Nugent, a son of the bankrupt, and which belonged to the bankrupt estate. The Referee ordered William T. Nugent to show cause why the order to pay over should not be granted. He appeared and filed a response which in substance alleged, that having received the money from the bankrupt, prior to the filing of the petition, the Court had no jurisdiction to compel it to pay over. *He admitted that he held it for the bankrupt.*

This Court in its opinion said:

> "There was no pretense that at the date of the filing of this petition in bankruptcy this money of the bankrupt, $4,133.45 of which had been collected a few days, and $10,100 a few hours, before, was held subject to any adverse claim, or that the right or title thereto had been passed over to another" (p. 14). * * *
>
> "In this case, however, the defendant asserted no right or title to the property before the referee, and the circumstances under which he held possession, must be accepted as found by the referee and the District Court" (p. 15). * * *
>
> "In the case before us William T. Nugent held this money as the agent of his father, the bankrupt, and without any claim of adverse interest in himself" (p. 17).

This Court, however, has particularly called attention to the fact that the quoted excerpt from the opinion in Mueller *vs.* Nugent, is limited in its effect to the particular facts in that case, and has no application to a case like the one at bar.

In *York Manufacturing Co. vs. Cassell, 201 U. S., 344,* a contract was entered into between the York Manufacturing Co. and the bankrupt in the nature of a conditional sale. The property, which was the subject of the contract, came into the pos-

session of the bankrupt. After the adjudication, the vendor sought to recover the property of the trustee under the terms of the contract which provided that the title to and ownership of the property shall remain in the York Manufacturing Co. until the entire purchase price agreed upon had actually been paid in cash. This application was resisted by the trustee.

The Referee held that the York Manufacturing Co. had no lien on the machinery, but was a general creditor only. The District Court affirmed this ruling, which was in turn affirmed by the Circuit Court of Appeals.

This Court reversing the decisions of the lower Courts said at p. 352 of its opinion:

> "We come then to the question whether the adjudication in bankruptcy was equivalent to a judgment, attachment or other specific lien upon the machinery. The Circuit Court of Appeals has held herein that the seizure by the court of bankruptcy operated as an attachment and an injunction for the benefit of all persons having interests in the bankrupt's estate. We are of opinion that it did not operate as a lien upon the machinery as against the York Mfg. Co., the vendor thereof. Under the provisions of the Bankrupt Act, the trustee in bankruptcy is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued. At that time the right, as between the bankrupt and the York Mfg. Co., was in the latter Company to take the machinery on account of default in the payment therefor. The trustee under such circumstances stands simply in the shoes of the bankrupt and as between them he has no greater right than the bankrupt. * * * THE REMARK MADE IN MULLER VS. NUGENT, 184 U. S., 1, 'THAT THE

> FILING OF THE PETITION (IN BANKRUPTCY) IS A CAVEAT TO ALL THE WORLD, AND IN EFFECT AN ATTACHMENT AND INJUNCTION, WAS MADE IN REGARD TO THE PARTICULAR FACTS IN THAT CASE. THE CASE ITSELF RAISED QUESTIONS ENTIRELY FOREIGN TO THE ONE HEREIN ARISING, AND DID NOT INVOLVE ANY INQUIRY INTO THE TITLE OF THE TRUSTEE IN BANKRUPTCY AS BETWEEN HIMSELF AND THE BANKRUPT, UNDER SUCH FACTS AS ARE BEING STATED. THE DISPUTE IN THE MULLER CASE WAS WHETHER THE COURT IN BANKRUPTCY HAD POWER TO COMPEL, IN A SUMMARY WAY, THE SURRENDER OF MONEY OR OTHER PROPERTY OF THE BANKRUPT IN POSSESSION OF THE BANKRUPT, *or of some one for him, without resorting to a suit for that purpose.* * * *" (Italics ours.)

Whitney vs. Wenman, 198 U. S., 539, cited by the Appellant, is wholly inapplicable to any phase of this case. A perusal of the opinion discloses that the point upon which the case turned, was the fact that under the allegations of the complaint, admitted to be true by the demurrer, the property sought to be recovered by the trustee, *was the property of the bankrupt in his possession at the time of the filing of the petition,* which came into the possession of the court upon the appointment of a Receiver, and which the Receiver without authority collusively delivered to the defendants.

At the same term at which *Whitney vs. Wenman* was decided, this Court also decided the case of *First National Bank against Chicago Title & Trust Co., 198 U. S., 280.*

There a trustee claimed the right to possession of certain merchandise of the bankrupt in storage, warehouse receipts for which he had hypothecated for loans. The trustee instituted summary proceedings for possession, and it was pointed out by this Court that jurisdiction of the District

Court did not exist *because that court had found that it was not in possession of the property.*

Refering to that case Mr. Justice Day in Whitney *v.* Wenman said:

> "In the case of First National Bank of Chicago *v.* Title & Trust Co. * * * in holding that the jurisdiction of the District Court did not obtain, it was pointed out that the Court had found that it was not in possession of the property."

Bryan vs. Bernheimer, 181 U. S., 188, also relied upon by the Appellant, is distinguishable for the reason that this Court particularly called attention to the fact that that case did not involve a question of jurisdiction over a suit by a trustee *against a person claiming an adverse interest in himself.*

In that case Abraham made a general assignment for the benefit of creditors to Davidson nine days before the filing of the petition in bankruptcy. The assignee sold the assigned estate to Bernheimer after the adjudication and before the appointment of a trustee. The petitioning creditors applied to the District Court for an order to take possession of the property which the Court ordered the Marshal to do. Notice was given to Bernheimer to appear and propound his claim. This he did voluntarily, and not content with stating the circumstances under which he purchased he asked for affirmative relief that the creditors be remitted to the fund in Davidson's hands derived from the purchase price of the property, or in default of such order, that Davidson be directed to pay the fund into court and that it be paid over to him, *he, thereupon offering to rescind the purchase and to waive all further claim to the property.* The petitioning creditors demurred to Bernheimer's claim, which was sus-

tained. The Circuit Court of Appeals reversed the District Court on the ground that the latter, as a Court of Bankruptcy, had no jurisdiction to try the question of title by summary proceedings.

It was this proposition to which this Court addressed itself in deciding the case and in reversing the judgment of the Circuit Court of Appeals stress was laid on the fact that Bernheimer consented to the form of the proceedings and that therefore the District Court as a Court of Bankruptcy, was authorized to determine the controversy.

That case presents no parallel to the present. Here the bank acquired its interest in the policies more than two years prior to the filing of the petition by the terms of an express contract, the validity of which cannot be doubted. It was entitled to sell the policies at public or private sale without notice or advertisement upon default. Default had occurred prior to the filing of the petition in bankruptcy, and thus the right of the bank to resort to its contractual remedy became perfect before there was any attempt to resort to the jurisdiction of a Court of Bankruptcy.

In the case at bar, the policies were not in the possession of the bankrupt, and never came into the actual or constructive possession of the Receiver. Further, the bankrupt had transferred them to the appellee by a power coupled with an interest which survived his death or insolvency. The bank's title could only be divested by payment of the debt.

As was aptly said by the Circuit Court of Appeals in its opinion in the case at bar (p. 823),

> "Under the former act, there were many decisions that a lien previously acquired

could not be enforced subsequent to the commencement of the proceeding, except with the permission of the Bankruptcy Court. The Supreme Court, however, refused to sanction these decisions, and held that the lienor was entitled to perfect his title and enforce his rights as though no proceeding had been commenced. *Eyster v. Gaff, 91 U. S., 521; Jerome vs. McCarter, 94 U. S., 734.* The change in the present act by which the trustee's title is that only which exists at the date of the adjudication, removed any uncertainty which arose under the Act of 1867. It was intended, we think, to permit all legitimate business transactions between the debtor and those dealing with him to be carried out and consummated as freely, until he has been adjudicated a bankrupt, as though no proceeding were pending. In many cases the proceeding against an alleged bankrupt is unfounded, and for this and other reasons never culminates in an adjudication. While the filing of the petition in bankruptcy is a caveat to all the world, the notice ought not to have the effect of paralyzing all business dealings with the debtor, or to prevent lienors or pledgees from enforcing their contracts. This is its practical effect, if the rights and remedies of all concerned are in suspense, until it can be ascertained whether an adjudication is or is not to follow the commencement of the proceeding. That Congress did not intend that lienors or pledgees should be prejudiced in enforcing their rights by the commencement of the proceedings in bankruptcy, is indicated by the change made in the present act with respect to the proof of claims by secured creditors."

144 Fed. Rep., 818.

VII.

The decree appealed from should be affirmed in all respects with costs.

Respectfully submitted,

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of Counsel.